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IN THE

Supreme Court of the United States

October Term, 1948

No. 189

SHAMROCK TOWING CO., INC.,

Petitioner,

—v.—

F. E. GRAUWILLER TRANSPORTATION CO., INC., GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, THOMAS HENRY MATERIAL CO., and THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for the Petitioner.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Shamrock Towing Co., Inc., respectfully prays for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit which reversed the decree of the District Court for the Eastern District of New York in an admiralty proceeding in which the following is a

Statement of Matter Involved

This is a proceeding in admiralty by F. E. Grauwiller, as owner of the scow Sherlie, against Gallagher Brothers Sand & Gravel Corp. (hereinafter referred to as Gallagher Brothers) for damage to said scow while under charter. The latter impleaded Shamrock Towing Co., Inc., and the tug James J. McGuirl, which had delivered said scow to the consignee of the cargo, the Thomas Henry Material Co., which corporation was also lessee of Pier 15, West New York, New Jersey, under a lease from New York Central Railroad Company. The two latter corporations were impleaded by your petitioner.

Thomas Henry Material Co. had purchased a load of sand and gravel from Gallagher Brothers and ordered the same to be delivered to its pier, Pier 15, on the morning of April 11, 1946 (R. 303). Said cargo was laden aboard the scow Sherlie and Gallagher Brothers ordered petitioner to tow said scow, with its cargo, to the consignee's dock. Said dock extended about 240 feet out from the bulkhead and beyond said pier for some 400 feet into the river was a bed of spiles, partially submerged, upon which a deck, which had been abandoned, formerly rested (R. 303). Petitioner's tug when it arrived at said pier found the same congested with about 8 or 10 feet available of the northeasterly corner of the consignee's dock whereat to moor the Sherlie (R. 267). The congestion of the slip was due to the fact that 2 scows of approximately 227 feet in overall length occupied the northerly face of Pier 15 (R. 261, 262) and a steamer occupied the southerly face of the coal dock, immediately north of Pier 15. The beams of the steamer on the north side of the slip bordered by Pier 15 and the coal dock and of the scows on the south side of the slip allowed about 10 feet of open water between them (R. 262).

The Sherlie's beam of about 33½ feet (R. 260), despite the fact that petitioner's tug was pushing (R. 262), precluded the Sherlie being moored any place other than at the northeasterly part of Pier 15, as aforesaid. The Sherlie was landed and made fast at 5:25 P.M. (R. 267), just after flood tide (R. 268). Sherlie's bargee made fast his own lines (R. 303). The bargee told petitioner's tug captain that he was all right and the tug departed (R. 89). The bargee testified that he immediately went to the consignee's office on the dock and notified his arrival to the consignee's office staff (R. 262) and there was no doubt in the District Court's mind that the arrival of the Sherlie was notified by her bargee to the consignee's office staff at least an hour before closing time (R. 264, 268). The Sherlie remained in safety for *over 5 hours,* after the tug had departed, despite the fact that an ebb tide had been running for approximately 2 hours prior to the accident for which suit was brought (R. 268, 304). As late as 9:00 P.M., Sherlie's bargee saw that she was in good shape and it was at about 10:00 P.M. that he first realized that she was careening to port and he scrambled out of his cabin and dove over the after rail (R. 304). Later examination of the Sherlie showed that she had a hole in her port stern corner (R. 304).

The Trial Court found, after hearing all of the witnesses in open court, that delivery had been made to the consignee, who therefore became the bailee of the Sherlie and accountable for an explanation of how the damage was sustained. The Trial Court ascribed credibility to Sherlie's bargee's testimony. Further, the Trial Court found on the basis of the testimony of the bargee of the scow Port Jefferson 11, one of the scows moored to the northerly face of Pier 15, that the Port Jefferson 11, to which the Sherlie was made fast and upon which she depended for support, had been shifted across the slip by Henry's employees because the

Port Jefferson 11 was found there at midnight, which was approximately two hours after the capsizing of the Sherlie (R. 265, 266). This testimony was corroborated by certain photographs and by the failure of the consignee to call its watchman (R. 264, 265, 268, 269, 282). Ascribing credibility to the foregoing testimony, the District Court held the consignee, Thomas Henry Co., solely and primarily liable, Gallagher Brothers secondarily liable (R. 271) and exonerated the petitioner herein.

The Court of Appeals reweighed the credibility of the witnesses believed by the District Court and held the testimony of the bargee of the scow, which had been shifted, inherently incredible (R. 305). Further, it held that the testimony of the bargee of the Sherlie only proved that he had reported the arrival of the Sherlie to some unascertained persons and it thereby held that delivery had not been accepted. It placed upon the petitioner, whose tug had relinquished control of the scow some 5 hours before the disaster, the burden of showing whose negligence caused the disaster and the burden of obtaining express acceptance of delivery by an employee authorized by the consignee to accept delivery. A petition for rehearing was denied (R. 319) by which it was sought to have determined the libellant's negligence, as projected by the Court of Appeals' disaffirmance of all the material findings of the District Court. This application for a writ of certiorari then followed.

Jurisdiction

The jurisdiction of this Court to entertain this petition and to grant the same is provided by Section 1254 of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5 (b).

Questions Presented

1. What weight is to be accorded by the U. S. Court of Appeals to findings of fact made by a District Judge after hearing all of the witnesses in an admiralty matter? Is an admiralty appeal a trial *de novo* or is an appellate court in admiralty limited to a review of the record to see if the findings of the Trial Court are "clearly erroneous"?

2. Is there any duty upon the tug to explain the damage caused to a vessel it towed some five hours before any accident where the accident occurs at a consignee's wharf, under lease to it, some five hours after the tug had departed from the scene and had received assurances from the scow's bargee that everything was all right?

3. Is there any duty on the part of a bargee, an employee of the owner of a scow, to move said scow during a five-hour period of time from a position subsequently held to be unsafe or is a scow owner through its employees relieved of all duty to care for its own property once it has turned over the scow to a tug?

4. What proof does it take to show a delivery of a scow by a tug to a consignee in order to project who, as between tug and consignee, had a duty to safeguard the scow?

Opinions Below

The opinion of May 18, 1948 of the United States District Court for the Eastern District of New York is not officially reported, but appears at pages 260-266 inclusive of the record. The opinion of April 5, 1949 of the U. S. Court of Appeals, Second Circuit, is officially reported at 173 F. (2d) 708 and the same appears at pages 302-306 inclusive of the record. The *Per Curiam* opinion of the U. S. Court of Appeals, Second Circuit, of April 25, 1949, denying rehearing appears at page 319 of the record.

Reasons Relied Upon for Allowance of the Writ

1. The decision of the U. S. Court of Appeals, Second Circuit, in holding that the petitioner's tug had the burden of proving that the consignee was guilty of an intervening fault, which caused damage to the libellant's scow herein, is directly contra to what this Court said in *Stevens* v. *The White City*, 285 U. S. 195. Further, the decision of the U. S. Court of Appeals in the instant matter which places the burden of explanation upon the tug is directly contra to the U. S. Court of Appeals, Second Circuit, recent appreciation in the *Stevens* case, *supra*, in its decision in *New York Trap Rock Corp.* v. *Christie Scow Corp.*, 162 F. (2d) 624.

2. The decisions of this Court in *Reid* v. *Fargo*, 241 U. S. 544 and *Brooklyn Eastern District Terminal* v. *U. S.*, 287 U. S. 170, have been whittled down as to their effect by the U. S. Court of Appeals, Second Circuit, decision in *Petterson Lighterage T. Corp.* v. *New York Central Co.*, 126 F. (2d) 992 as to whether an appeal in admiralty is a trial *de novo* or whether a reviewing court in an admiralty appeal "rehears" an admiralty matter to determine whether the findings of fact made by the District Court under General Admiralty Rule 46½ are supported by the record. In the instant case, the U. S. Court of Appeals, Second Circuit, has overruled the effect of its decision in the *Petterson* case, *supra*, without so stating and has projected uncertainty as to the scope of appeals in admiralty. The decisions of this Circuit since the *Petterson* case, *supra*, and prior to the instant one are in direct conflict in rationale to the decisions of this Court in *Reid* v. *Fargo*, *supra*, and *Brooklyn Eastern District Terminal* v. *U. S.*, *supra*. The decisions in this Circuit are in conflict with those decisions on the same point in the Fifth Circuit (*The Friendship 11*, 135 F. (2d) 520; *The Lapwing*, 150 F. (2d) 214) and in the Third Circuit (*The Mamei*, 152 F. (2d) 924). Settle-

ment of the scope of appeals in admiralty should emanate from this Court and certainly have concerned the members of this Court at one time or another. (See letter of the late Chief Justice Harlan F. Stone to the President of the Maritime Law Association of the United States, dated October 26, 1941, contained in Document No. 266, dated December 1941, of said Association.)

3. The delineation of the rights and duties of a scow owner, tug owner and consignee is of paramount public importance in this harbor as well as in all harbors in this country in which tugs ply their trade. This matter commends itself to a consideration by this Court on the basis of its importance to the operation of the Federal system of admiralty law. (See Concurring Opinion of Mr. Justice Frankfurter in *Wilkerson* v. *McCarthy*, 69 S. Ct. 413.) In the instant matter, the U. S. Court of Appeals, Second Circuit, reversed the District Court in so far as the liability of the petitioner's tug is concerned and thereby projected for the first time the duty of the scow owner, through his attendant bargee, to care for its own scow in a berth held to be patently unsafe. To correct the effect of the U. S. Court of Appeals determination which projected for the first time the question of the scow owner's negligence, the petition for rehearing was filed which was denied without opinion. The net result of this matter is to leave the law in doubt in this Circuit as to the duty of care owing to a scow by a scow owner's employee in a situation where the scow had been moored by a tug some five hours prior to the accident complained of. The conflict within the Circuit itself should be resolved by this Court.

4. Prior to the instant decision, delivery in the eyes of the law, as said law was applied in the instant Circuit, amounted to a tender of a scow by its scow owner and an acceptance of the scow as testified to by the scow owner's

bargee. In order to overthrow the finding in the instant matter that the scow's arrival had been notified by the scow owner's bargee to the consignee, the U. S. Court of Appeals in its opinion (R. 306) determined that the testimony of the bargee, which was believed by the District Court, did not show an express acceptance by an employee authorized by the consignee to accept delivery. The quality of the testimony here involved, held to be believable and so accredited by the District Judge, always constituted delivery prior to the instant decision. If the test laid down by the U. S. Court of Appeals in the instant matter is to be applied, to wit, that a tug master must disembark from his tug and procure an express acceptance of the scow by the consignee, then a tug owner becomes the insurer of the safety of its tow in so far as delivery of the same to a proper person is involved. This Court recently had before it in seamen cases, the scope of the authority of an agent relied upon by third persons in personal injury cases. The instant matter by question "4" poses for this Court's determination the test to be applied to determine the authority of an employee of a consignee in order to constitute delivery as between tug and consignee.

Shipping interests at large look to this Court for a delineation of their duties in an ordinary harbor situation involving scow, tug and consignee.

Wherefore, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

SHAMROCK TOWING CO., INC.,
Petitioner.

By EDWARD ASH
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This Court should settle the scope of appeals in admiralty so that litigants may know whether an appeal is a trial *de novo* or is limited to a review of the record in order to see whether findings made by the District Court are "clearly erroneous".

For a great many years appeals in the admiralty have been looked upon as "new trials" and said theory is discussed in *Munson* v. *Miramar*, 167 F. 960. Said doctrine of a trial *de novo* has been recognized on many occasions by this Court. See *Watts* v. *Unione*, 248 U. S. 9, 21; *Standard Oil Co.* v *Southern Pacific Co.*, 268 U. S. 146, 155; *Reid* v.

Fargo, 241 U. S. 544; *Brooklyn Eastern District Terminal* v. *U. S.*, 287 U. S. 170.

The U. S. Court of Appeals for the Second Circuit, in 1942 decided *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 126 F. (2d) 992, in which said Court reviewed the scope of appeals and the rules governing the same since 1789 and through the years when the various Federal Courts were established. The Court in discussing the scope of appeals said (p. 996):

> "Moreover, not much of any practical importance survives of the doctrine that an appeal in admiralty is a new trial.
>
> * * * * *
>
> "It would perhaps be too much to say that no vestige of the doctrine may still lurk in some cranny of the law, though we do not at the moment think of any; but certainly as to the question before us here, it is not only obsolete, but at war with all modern procedural tendencies which seek to center responsibility for the decision of the facts upon the trial judge."

Earlier the same Court had indicated in *Commercial Molasses Corp.* v. *New York Tank B. Corp.*, 114 F. (2d) 248, 250, that Admiralty Rule 46½ was equal to and the counterpart of Federal Rule of Civil Procedure 52 (a). Since said cases, the same Court has reiterated in many cases its statement as to the scope of admiralty appeals. See, in this connection:

> *Johnson* v. *U. S.*, 168 F. (2d) 886;
> *Farrell* v. *U. S.*, 167 F. (2d) 781;

The Paul Dana v. *Socony Vacuum Oil Co., Inc.*, 165 F. (2d) 78;
Eastern Transportation Co. v. *U. S.*, 167 F. (2d) 559, 560;
Merritt-Chapman Scott v. *U. S.*, 174 F. (2d) 205.

Despite its reaffirmation of its views as to the scope of admiralty appeals, which as petitioner views it, is contra to the decisions of this Court, *supra*, the U. S. Court of Appeals for the Second Circuit in the instant matter tacitly disaffirmed said views and reversed the District Court, which had heard all of the witnesses in open court and had determined their respective credibility. In reversing the District Court, the U. S. Court of Appeals, Second Circuit, reweighed the credibility of various witnesses whose testimony was highly material to the outcome of this litigation. In reweighing said credibility and arriving at a contrary result from that of the District Court, the U. S. Court of Appeals, Second Circuit, flew in the face of its prior decisions with respect to credibility of witnesses without making any distinction for so doing. With respect to credibility of witnesses not being reweighed by an appellate court, see the decisions of the U. S. Court of Appeals, Second Circuit, in *Kable* v. *U. S.*, 169 F. (2d) 90; *The C. W. Crane*, 155 F. (2d) 940; *Connors Marine Co. Inc.* v. *Moran Towing Corporation*, 152 F. (2d) 653; *Wessels* v. *The Asturias*, 126 F. (2d) 999; *Sinram* v. *Pennsylvania R. Co.*, 61 F. (2d) 767; *United States Lighterage Corp.* v. *Petterson Lighterage & Transportation Corp.*, 142 F. (2d) 197; *The Agnes A. Moran*, 143 F. (2d) 964; *Seaboard Sand & Gravel Corp.* v. *American Stevedores*, 151 F. (2d) 846.

As recently as May 27, 1949, the U. S. Court of Appeals, Second Circuit, in *Broadcast Music Inc., et al.* v. *Havana Madrid Restaurant Corporation*, Docket No. 21309, re-

viewed the scope of appeals in non-jury cases in dealing with uncontradicted testimony and in said decision the Court, per Frank, *C.J.*, shows quite clearly the various factors which a Trial Judge places in a crucible of analysis to determine credibility, *e.g.*, demeanor, hesitancy in answering, *etc.*, all of which precludes an appellate court from reweighing testimony. The instant matter, as do many appeals in admiralty, revolves around credibility of witnesses and if litigants are to know their rights and are to know the rules that govern trials and appeals based upon credibility of witnesses then certainly clarification of the scope of admiralty appeals should emanate from this Court so that the law governing the shipping industry and not only the parties to a law suit may be defined. That the scope of admiralty appeals has commanded the attention of many is reflected in part by the late Chief Justice Stone's letter to the President of the Maritime Law Association of the United States, said letter being dated October 26, 1941, Document #266, December 1941, and the subsequent action thereupon by said Association as contained in Document #268, December 1941; Document #267, December 1941; Document #272, March 1942.

There is no burden of explanation on the part of a tug as to damage to a scow, previously towed by said tug, especially after the tug has departed from the scene of an accident which takes place some five hours after said departure.

This Court in *Stevens* v. *The White City*, 285 U. S. 195, held unequivocally that a tug is not a bailee of a scow while the same is being towed by the tug. Further, the scow owner has the burden of proof throughout the trial, unaided by any presumptions, to show fault on the part of the tug. Only where there is a bailment, and said relationship does

not exist between tug and tow, is there any duty of explanation on the part of the bailee to show how the bailed article sustained damage. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104. In the instant matter the tow had been delivered to its designation and the tug had departed and had been away from the scene for some five hours before anything happened which contributed in anywise to the disaster. Certainly, if no bailment exists at the moment of towage, none can possibly exist five hours after the tug has departed from the place to which its tow has been delivered. In the instant matter, the U. S. Court of Appeals, Second Circuit, held that the petitioner had the burden of proving that the consignee was guilty of an intervening fault and that it failed to carry the same (R. 305). If its determination on this point was proper, then every tug becomes a bailee of its tow and is called upon to explain the cause of damage to said scow. This burden, now placed upon the tug by this Court, is nothing more than a bailee's burden of explanation.

Where a scow owner's bargee acquiesces in a berth which turns out to be unsafe with no assurance having been given by the tug, said bargee's employer, the scow owner, is guilty of negligence and said negligence mitigates the damages recoverable by said scow owner.

After the U. S. Court of Appeals, Second Circuit, had handed down its decision reversing the District Court's determination of non-liability on the part of the petitioner and its tug, the petitioner filed a petition for rehearing (R. 308). In said petition for rehearing, the petitioner outlined to the Court its decisions dealing with a scow owner being negligent where its bargee acquiesced in an unsafe

berth in a situation where no assurance as to the berth and the safety thereof were given by the tug and no soundings were taken by the bargee of said berth.

The decisions of the Court below dealing with the negligence of a scow owner in such a situation are:

The W. H. Baldwin, 271 F. 411;
Nassau Sand & Gravel Co. Inc. v. *Red Star Towing & Transp. Co.,* 62 F. (2d) 356;
Cities Service Trans. Co. v. *Gulf Refining Co.,* 79 F. (2d) 521;
James H. Rhodes & Co. v. *United States Lighterage Corp.,* 98 F. (2d) 770.

The reason for the application of the rule is bottomed upon the fact that a bargee is not a mere automaton (*Sinram* v. *P. R. R. Co.,* 61 F. (2d) 767). In so far as the facts at bar are concerned, the same show that the scow owner's bargee acquiesced in the berth at which the scow was placed for over five hours during which time the condition of the berth, ultimately found to be unsafe, was patent and clearly visible to him. If said bargee decided to be inactive, certainly the same cannot relieve his employer being tarred with an imputation of negligence in that respect. Said imputation of fault would operate to diminish damages in favor of the scow owner to the extent of one-half of the damages sustained. The reason for such a holding is found in the principle that an owner of property is under a duty to minimize a risk or a loss and cannot stand idly by and take the position that no effort will be made to do anything to extricate said property from the position of danger into which said property was placed. That there is a conflict of decisions as to the duty of care owed by the scow owner, through its bargee, to its scow is readily seen from a read-

ing of the cases heretofore set forth under this particular point. The correlative duties of a scow owner and a tug owner cry for clarification and illumination.

A tug owner and a scow owner are entitled to rely upon the apparent authority of a consignee's employees to accept delivery of a scow destined for said consignee's wharf.

The duties of care owed by the scow owner, the tug owner, and a consignee of a scow stem from the proposition that the scow was either delivered or not delivered to the consignee by a tug owner. In the instant case, the District Court found that there was no doubt in its mind that the actual arrival of the scow in question was notified by the scow owner's bargee to the consignee and that delivery was thereby made (R. 264-268). From such a determination of the Trial Court the duties and obligations owing by the respective parties hereto came into play and as the opinion of the District Court shows (R. 260-266) and as its opinion of rehearing indicates (R. 282-284) said delivery was the keynote of this matter.

The U. S. Court of Appeals, Second Circuit, apparently appreciated this proposition quite well, for it determined that in order to justify the conclusion to which it had arrived the finding of delivery would have to be upset and overturned. To accomplish this result, the Court in its opinion determined that acceptance of delivery of the scow in question had not been given by the consignee through employees who were authorized to accept delivery of said scow. It thereupon determined that the record did not show what the authority was of the person or persons who had accepted delivery of the scow on behalf of the consignee, as had been testified to by the scow owner's bargee. It

characterized the testimony of the scow's bargee as being utterly inadequate and maundering. The appellate court accepted the testimony of the consignee's employees that there was no one in the office to accept the delivery of the scow, which was in direct conflict with the testimony of the scow's bargee. The reversal of the District Court by the U. S. Court of Appeals again reflects the acceptance of testimony by the appellate court which was held to be incredible by the District Court.

Further, if tug operations of this or any other harbor are to continue, a tug owner cannot be called upon to have its tug captain ascertain the exact authority of the person on the consignee's premises who accepts delivery of the scow. The duty which the Court below has placed upon a tug owner is an indeed onerous one and is born of the Court's desire to upset the finding of delivery from which all duties flowed.

Wherefore, it is respectfully submitted that this case is one calling for the granting of a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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CHRISTOPHER E. HECKMAN,
Proctor for Respondents.

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BRIEF FOR RESPONDENTS F. E. GRAUWILLER TRANSPORTATION CO., INC., AND GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

POINT I

The Court of Appeals rightly imposed on petitioner the burden of proving that another's negligence intervened between the negligent mooring by petitioner's tug and the damage.

Petitioner overlooks the findings of its own negligence in mooring when it states that the Court of Appeals imposed on a tug the duty of explaining damage to its tow. The holding of the Court of Appeals was that petitioner

had failed to carry "the burden of proving that the Henry Company was guilty" of intervening fault (R. 305).*

Petitioner does not dispute that the scow *Sherlie* overturned and sank because she was holed by a spile (Finding No. 11, 268, Opinion, 263, C. A. Opinion, 304).

Nor does petitioner assert error in the holding that petitioner's tug *James J. McGuirl* was negligent in mooring the *Sherlie* so close to the spiles and in such manner that after the tide began to ebb she would drift over them (Findings Nos. 4, 5 and 6, 267-8; Conclusion 1, 269). Of the tug's actions the Court of Appeals said (304):

> "The negligence of the tug is beyond debate, and so the judge found. Indeed, it was most gross; for, since the *Sherlie* was 112 feet long, over nine-tenths of her length lay beyond the end of the pier and close alongside the broken spiles. The ebb tide had a leverage upon her outer end which made it most probable that the fasts by which she was moored to the pier and to the Port Jefferson, would either render or part. * * *"

The District Court had said (266):

> "Beyond doubt, *James J. McGuirl* was guilty of fault in leaving the *Sherlie* where she did. * * *"

In that situation the Court was clearly right in imposing on petitioner the burden of establishing intervening negligence by a fair preponderance of the evidence.

> "* * * To be relieved from the consequences of his own fault, a wrongdoer, must do more than merely suggest the possibility that the tort of another may have intervened. Cf. *Alexandre* v. *Machan*, 147 U. S. 72, 85, 13 S. Ct. 211, 37 L. Ed. 84, 85; *The C. E. Paul*, 175 F. 246 (D. C. N. J.); *The Newburgh*, 130 F. 321 (C. C. A. 2); *The Mexico*, 84 F. 504 (C. C. A. 2). The burden of proving that an intervening act

(References are to pages of the Record.)

of negligence caused the loss was on the appellant. *The Bartle Daly*, 45 F. (2d) 605 (C. C. A. 2); *The Gladiator*, 79 F. 445 (C. C. A. 1); *The Fensher, Swab*, 212."

The B. B. No. 21, 54 F. (2d) 532.

The District Court had concluded as a matter of law that petitioner had met its burden of proving intervening negligence (Conclusions 4 and 5, R. 269), but founded the conclusions on an inference based on another inference drawn from the testimony of a single witness that *after* the damage to the *Sherlie* he found some of the vessels in the slip in different positions (Conclusion 4, R. 269). There was no testimony that scows had been shifted *before* the damage or that the shifting caused the damage. There was ample denial that any shifting had been done. Nevertheless, the District Court drew an inference that scows had been shifted before the *Sherlie* was damaged, and from that inferred that the shifting caused the damage. The Court of Appeals referred to the testimony on which the District Court based its first inference as "well nigh incredible", stated it came from a witness whose memory was "obviously most unreliable" and reviewed the evidence which preponderated against it (Opinon, 304-5). The Court of Appeals made it plain that any finding based on such testimony was "clearly erroneous".

POINT II

The Court of Appeals rightly held that petitioner had not proven delivery of the *Sherlie* to the consignee Henry Company.

The Court of Appeals said (Opinion, p. 306):

> "Delivery is a mutual transaction which requires the consent of the person who is to take possession, as well as that of the one who gives it."
>
> * * * * * * *
>
> "This was not such a delivery; not only was it out of hours, but it was to the last decree perilous, as the event proved. If the tug would discharge itself of its duty, it was bound in such circumstances to secure an express acceptance, and there could be no acceptance except by an employee authorized by the Henry Company to accept. The maundering of the *Sherlie's* bargee was utterly inadequate for the purpose. If a tug master chooses to leave his charge wantonly exposed to destruction, he will not relieve his principal by sending an inarticulate bargee to announce what he has done to whomever he may find about the premises."

Petitioner has not cited any decision holding to the contrary in a case of this kind, where the asserted delivery was negligently made alongside a bed of spiles over which the changing tide would inevitably swing the scow.

POINT III

Neither respondent F. E. Grauwiller Transportation Co., Inc., nor respondent Gallagher Brothers Sand & Gravel Corporation was negligent. There could be no acceptance by the scowman of the improper mooring.

The *Sherlie* had no power of her own. It is conceded there was no way her keeper could arrange lines to avoid the consequence of the petitioner's negligent mooring (R. 111-2).

It is well settled that the lone man on a harbor craft of this kind does not have authority to vary contracts for safe delivery by failing to protest against the tug's improper mooring.

> "Having in mind the 'feckless folk' who frequently man barges, it would be out of reason to imply an authority in them to assume the risk of such damage on behalf of the owner of the boat."
>
> *The B. B. No. 21,* 54 F. (2d) 532 (*supra*).

See also *The P. Dougherty Co.* v. *G. M. McAllister,* 159 F. (2d) 486; Cert. denied 331 U. S. 848, 67 S. Ct. 1734.

CONCLUSION

No important questions are involved. Petitioner has not demonstrated conflict between this decision and those of this Court or of other Circuits. The decision of the Court of Appeals was correct and petitioner has failed to show any reason why this Court should grant a writ of certiorari.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Proctor for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 189.

SHAMROCK TOWING CO., INC.,
Petitioner,

v.

F. E. GRAUWILLER TRANSPORTATION CO., INC., GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, THOMAS HENRY MATERIAL CO. and THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondents.

Brief for Thomas Henry Material Co., in Opposition to Petition for Writ of Certiorari.

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THE REPORTER COMPANY, INC., New York City—1949

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Petitioner predicates its petition upon four questions which it asserts are of sufficient importance to warrant the intervention of this Court. They will be answered in the order in which they are presented.

Before, however, doing so, it is necessary to correct certain statements made by petitioner and to add some others, in order to present the true picture.

The scow was placed by petitioner's tug at *4:25 P. M.*, and not at 5:25 P. M. as petitioner states (fol. 304). The tugmaster, although he knew and recognized the visible dangers there prevailing, due to the proximity of the exposed spiles to the dock, made no effort to assure himself of the safety of the scow but relied entirely upon the statement of the bargee that he was "all right"

(fol. 303) and left. He neither attempted to survey the situation for himself (fol. 316) nor to ascertain from the consignee that leaving the scow in that dangerous place was acceptable. The locale was familiar to him, he having made deliveries to and from that dock for fifteen years (fol. 338). Petitioner says that the "Sherlie remained in safety for over 5 hours after the tug had departed." That is not so, for she was never "in safety," moored where she was left by the tug close to the exposed spiles. Indeed, the District Court thought so, otherwise it would not have found the tug negligent for having placed the scow in that position (fols. 802, 806). The tug having brought that condition about with full knowledge of the foreseeable dangers, was bound to answer for the loss that followed, and if she sought to escape from the consequences of her own negligence, she was bound to show affirmatively that the disaster was due to the fault of the Thomas Henry Material Company.

In the case of the *B. B. No. 21,* 2 Cir., 54 F. 2d 532, the Court of Appeals said, in treating with a precisely similar situation:

> "* * * To be relieved from the consequences of his own fault, a wrongdoer *must do more than merely suggest the possibility that the tort of another may have intervened.* * * * The burden of proving that an intervening act of negligence caused the loss was on the (tug)."

Petitioner offered no proof either to exculpate itself or to establish negligence on the part of the Thomas Henry Material Company. Even the District Judge was unable to make such a finding, his holding that the Thomas Henry Company was liable being based upon an inference and nothing more (fols. 803, 810).

"An inference must be founded on a fact legally proved."

The Indien, 5 F. Supp. 349, affirmed 9 Cir., 71 F. 2d 752.
P. Sanford Ross v. Moran Towing & Trans. Co., Inc., 2 Cir., 55 F. 2d 1052.
The Pride, 2 Cir., 135 F. 2d 999.

Petitioner further says (p. 3) that at 10:00 P. M. or one hour after the bargee saw that his scow was in good shape he first realized that she was careening. That is not a correct statement of the facts as borne out by the record. The bargee's testimony was that *immediately* after he had gone up on the deck of his scow at 9:00 or 9:30 P. M., and found everything in order, he returned to his cabin when he noticed her listing (fols. 252-253), which precipitated her capsizing.

(1) We recognize the rule that an Appellate Court should not disturb the facts found by the Trial Court unless they are clearly erroneous. That the facts found in this case by the Trial Court were clearly erroneous is amply supported by the record. That was brought to the attention of the Court of Appeals by the Assignments of Error filed by the Thomas Henry Company (See Assignments 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, Record pp. 288-291). Libellant also assigned error for the same reason (Record p. 294) as did the respondent Gallagher Brothers Sand & Gravel Corporation (Record p. 296).

That an Appellate Court even in reviewing an admiralty decree is not throttled by the findings of the Trial Court is settled. And where the Trial Judge's opportunity to appraise the testimony was no better than was the opportunity of the Appellate Court, the latter could examine the testimony and make its own appraisal thereof.

Pfeiffer Oil Transp. Co. v. The Ira S. Bushey, 2 Cir., 129 F. 2d 606.
The Coastwise, 2 Cir., 68 F. 2d 720.
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The Anaconda, 4 Cir., 164 F. 2d 224.

Although the facts were in dispute, the more serious error committed by the Trial Court lay in its appraisal of or its deductions or inferences drawn from certain uncontroverted facts. The Appellate Court was in the same position as was the Trial Court to appraise these facts and make its own findings.

> "* * * but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage. It is true that, when the wrong is not deliberate, the occurrence of the loss or damage by hypothesis involves a factor of probability and it may be argued that probability is a question of fact. Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values; the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act. Certainly such a decision is not like a decision of fact uncolored by any element of choice or fiat. We are therefore free to exercise our own judgment upon Broges's conduct and we

hold that he was negligent both in failing to take quicker action to examine the cross bunker, in failing to break the hatches in the 'Reserve Bunker.' * * *"

Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 159 F. 2d 661, 665, Cert. denied, 67 S. Ct. 1519, 331 U. S. 836, 91 L. Ed. 1849.

It will be observed that this case, like the one at bar, was decided upon facts which were not disturbed by the Appellate Court but were rather appraised differently than the Trial Court, and this Court refused to grant a writ of certiorari to review that holding.

There should be, we respectfully submit, no apprehension to the shipping industry, as petitioner fears, over the revaluation of testimony by an Appellate Court in an admiralty case. Surely, petitioner does not seriously contend that every finding by a Trial Court is binding and conclusive upon an Appellate Court, for if that were so, an appeal would in most cases be a futile gesture. Indeed, the cases cited *supra* indicate clearly the latitude given to the Appellate Courts in reviewing findings made by the Trial Judge. There is, therefore, no merit to petitioner's contention under this point.

(2) There is no question here of a bailee's liability between the tug and the scow. It is rather a question whether the tug performed her duty imposed by contract and by law to tow her scow to destination. It cannot be said that that duty is fulfilled when the tug takes her tow to the designated place and leaves her there. The tug is required to do more. She must make *delivery,* which means that the tow must be properly and securely placed before the tug can depart and that the tug's obligation continues until that is done.

The Bartle Daly, 2 Cir., 45 F. 2d 605.
The B. B. No. 21, 2 Cir., 54 F. 2d 532.

In the latter case, the Court said:

> "When a tug finds that she cannot deliver her tow at its destination, it is her duty to return the tow to its owner or to tie it up at some safe place and protect it at the point called for (citing cases). To leave the boat in an unsafe berth was not a performance of the Victoria's contract of towage."

This has been the established law for many years and cannot now be questioned or even challenged by petitioner's novel attempt to escape from its contractual liability by establishing the relationship between a tug and her tow as a bailment. The only question is, did the tug perform her duty toward the scow, i. e., to tow her to her destination and properly place her there? If the answer is in the negative, liability falls on her, not as a bailee of the scow, but rather for negligence in the performance of her agreement. In the case at bar, the tug clearly failed in her duty by leaving the boat in an unsafe berth, and since disaster befell the scow as a result thereof, she became liable. Indeed, the District Court so held (fols. 796, 802), and the Court of Appeals agreed (p. 304).

3) Petitioner here for the first time is attempting to place part of the blame upon the scow owner to mitigate its own damages. Our answer to that contention is manifold.

(a) Nowhere in the course of the trial did petitioner make that contention. In fact, its counsel, when asked his position, stated very clearly (Record p. 51):

> "We made her fast in the only available berth there was * * * we made her fast in what we believe was the proper manner."

Thus the only defense asserted and sought to be established by the tug on the trial was that she had performed

her contract and that the disaster resulted from acts thereafter done by the Henry Company.

(b) Petitioner's assignment of error (Record p. 292) is silent as to the fault of the scow owner, merely charging fault in the Trial Court for finding the tug negligent.

Nor did it raise this question in its briefs submitted to the Court of Appeals; it did, however, do so only upon an application for a rehearing, which the Court of Appeals denied.

(c) Petitioner was bound to safely secure the scow and having left her there without even dispatching a deckhand to assure itself of her safety (Record p. 109) in that perilous location was a reckless disregard of its duty to the scow. It could not rely upon the opinion of the bargee that he was "all right" and then leave the scene. There is therefore no occasion for the application of the rule which would require the scow owner to share in the loss.

4. The last point raised by petitioner is so elementary that we believe it answers itself. Without attempting to again review the facts, it will be remembered that the tug failed in its first step by leaving the scow at a place where the danger of damage was foreseeable, as the subsequent events proved. Recognizing such dangers, as its master admitted, he was bound for his own protection, to obtain the acquiescence and approval of the Henry Company to leave her there. None of the Henry Company's employees were then at the dock, all having left for the day pursuant to a union contract; no member of the tug's crew was sent either to the dock to examine the scow's fastenings, or if he found them insecure, to report to the Henry Company's officials and get their consent that the scow be left there. That the bargee went to the office to report his arrival to some men who "were

busy writing" was in no sense a tender of delivery. Nor was the answer he received of "All right, Captain," an acceptance. This was after the tug had gone. Will petitioner seriously say that leaving a scow in such a perilous position without having first received the approval of an official of the consignee constituted a proper delivery? It showed rather a clear indifference to consequences in the hope that nothing harmful would happen.

Finally, we respectfully submit that petitioner's application is based upon a review of facts passed upon by two Courts. In such circumstances this Court has held that it does not grant certiorari to review evidence and specific facts.

Wisconsin Electric Co. v. Dunsmore Co., 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728.

The petition should be denied.

Respectfully submitted,

MAX ROCKMORE,
DAVID HAAR,
Proctors for Thomas Henry Material Company.